Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ORIN S. SNOOK

Petitioner,

v.

JAN V. POPIEL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court in *Archer v. Warner*, 538 U.S. 314 (2003), articulated the controlling uniform test of national application to determine whether the award of attorneys' fees against Petitioner Orin S. Snook was a dischargeable debt under 11 U.S.C. § 523(a)(2)(A) in Mr. Snook's Chapter 7 bankruptcy proceeding. *Warner* required the Fifth Circuit Court of Appeals to make the fullest possible inquiry into the true nature of the attorneys' fees debt without regard for the form of action, verdict or judgment and without regard to concepts of "issue-preclusion" or "claims-preclusion."

The Fifth Circuit Court of Appeals failed to follow "the fullest possible inquiry" test. Instead, the Fifth Circuit Court of Appeals relied upon a pre-*Archer* test that, contrary to *Archer*, did not require the fullest possible inquiry into the true nature of the attorneys' fee debt.

As a result, there is no longer a uniform national bankruptcy test to determine which debts are dischargeable under 11 U.S.C. § 523(a)(2)(A). The test used to determine which debts are dischargeable in the states of Texas, Louisiana and Mississippi is in irreconcilable conflict with *Archer* and with the test used to determine which debts are dischargeable in the remaining forty-seven (47) states. Whether a bankruptcy debtor can achieve the fundamental function of a bankruptcy to discharge debts is now an arbitrary and capricious function of where the bankruptcy debtor files for bankruptcy.

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STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on February 22, 2006. This Court has jurisdiction of this proceeding by virtue of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 24.1(f), Snook attaches a copy of 11 U.S.C. § 523(a)(2)(A) at Pet. App 4.

STATEMENT OF THE CASE

I. *Factual Background*

On January 16, 2003, Judge Thomas Culver, 240th District Court, Fort Bend County, Texas, signed a Final Judgment awarding damages to Respondent Jan V. Popiel, Inc. (Popiel) and against Petitioner Orin S. Snook (Snook). (Pet. App. 5; 1 CR 132). Popiel's attorney prepared the form of the Final Judgment. (2 CR 272).

The Final Judgment included a specific section for the recovery of fraud damages:

> IT IS FURTHER ORDERED that Defendant Jan V. Popiel, Inc. have and recover judgment from and against Plaintiff Orin Snook, as follows:
>
> . . . Damages ***arising from fraud*** in the amount of One Thousand Seven Hundred Thirty-One and no/100 Dollars ($1,731.00) [together with pre and post-judgment interest]. . . .

(Pet. App. 5; 1 CR 133). This award was a complete award with pre- and post-judgment interest. (*Id.*). The Final Judgment also included separate awards for breach of contract damages, *quantum meruit* damages and attorneys' fees. (Pet. App. 5; 1 CR 133-134). The Final Judgment did not contain an award of punitive damages or any award for breach of a fiduciary duty. (*Id.*).

The Final Judgment incorporated the jury's verdict. (Pet. App. 5; 1 CR 132). Popiel had submitted separate liability and damage questions (1) on Popiel's fraud claim (Question Nos. 8 and 9), (2) on Popiel's breach of contract claim (Question Nos. 10, 11 and 12), and (3) on Popiel's *quantum meruit* claim (Question Nos. 13 and 14) (Pet. App. 5; 1 CR 183-191). The jury made separate damage awards to Popiel and against Snook under each of Popiel's three separate claims, namely $1,731.00 for fraud damages, $8,631.50 for breach of contract damages and $4,852.37 for *quantum meruit* damages. (*Id.*). The jury made a separate award of $108,000 in attorneys' fees. (*Id.*). Popiel submitted a jury question on fraud damages that instructed the jury not to award any attorneys' fees as part of any fraud damages.

(Pet. App. 5). Popiel has admitted that the fraud damages do not include any award of attorneys' fees:

> *The attorney's fees* that Popiel seeks to recover were awarded as attorney's fees, *are separate and distinct from the fraud damages*. . . .

(1 CR 116);

> Popiel has never asserted that the damages for fraud included attorney's fees . . .

(1 CR 118); and

> What Popiel's pleadings before [the Bankruptcy Court] do contend is that in cases where fraud and contract claims are litigated, attorneys fees (*not as fraud damages*) can be awarded to the successful litigant who proves that fraud and a breach of contract occurred.

(1 CR 118) (emphasis added).

II. *Course of the Proceedings Below*

On January 17, 2003, Popiel filed an original adversary complaint claiming that the jury award of $108,000 in attorneys' fees is not dischargeable. (1 CR 22). On February 18, 2003, Snook filed his motion to dismiss and original answer. (1 CR 29).

On January 22, 2004, the Bankruptcy Court issued its final judgment and supporting memorandum granting Popiel's motion for summary judgment and overruling

Snook's cross-motion for summary judgment. (Pet. App. 3; 3 CR 408, 415). On January 26, 2004, Snook perfected an appeal of the Bankruptcy Court's judgment. (1 CR 12, 15, 19; 3 CR 417, 419, 423). On September 9, 2004, the District Court issued an Order and supporting memorandum of opinion. (Pet. App. 2; 3 CR 586, 598). The District Court upheld the judgment of the Bankruptcy Court. (*Id.*). On September 20, 2004, Snook filed a motion for rehearing. (3 CR 599). On October 28, 2004, Popiel responded to that motion. (4 CR 607). On June 20, 2005, the District Court denied the motion for re-hearing. (Pet. App. 2; 4 CR 615). On June 24, 2005, Snook perfected his appeal to the Fifth Circuit Court of Appeals. (4 CR. 619-629). On February 22, 2006, the Fifth Circuit Court of Appeals affirmed the District Court through a summary opinion. (Pet. App. 1). Within ninety (90) days, Snook filed this petition.

SUMMARY OF ARGUMENT

Archer v. Warner, 538 U.S. 314 (2003), settled the test to determine which debts are dischargeable under 11 U.S.C. § 523(a)(2)(A). Under the *Archer* test of national application, a court must conduct a full inquiry into the true origin of a debt. If the true origin of the debt, regardless of the form of action, verdict or judgment or principles of issue or claims preclusion, is a breach of contract (i.e. the debt requires a breach of contract to exist), then the debt is fully dischargeable. This uniform test of national application, however, no longer exists.

The Fifth Circuit Court of Appeals decided not to apply the "full inquiry" test. Rather, it adopted a pre-*Archer* test that did not require the same "full inquiry." As a result, the Fifth Circuit Court of Appeals held that an award of attorneys' fees that traces its origin to a breach of contract and that cannot exist in the absence of a breach of contract is a non-dischargeable fraud debt and is not a dischargeable breach of contract debt.

This fundamental error of the Fifth Circuit Court of Appeals not only harmed Snook in a material manner, but it harmed national bankruptcy jurisprudence in a material manner. It upset the *Archer* test of national application. As a result, there is no longer a uniform national bankruptcy test to determine which debts are dischargeable under 11 U.S.C. § 523(a)(2)(A). The test used to determine which debts are dischargeable in the states of Texas, Louisiana and Mississippi is in irreconcilable conflict with *Archer* and with the test used to determine which debts are dischargeable in the remaining forty-seven (47) states. Whether a bankruptcy debtor can achieve the fundamental function of bankruptcy to discharge debts is now an arbitrary and capricious function of where the bankruptcy debtor files for bankruptcy.

This Court should grant this petition to resolve the conflict and to restore the integrity of the *Archer* test under 11 U.S.C. § 523(a)(2)(A). After granting this petition, this Court should reverse the lower courts and find that the award of attorneys' fees is fully dischargeable.

REASONS FOR GRANTING THE PETITION

Archer v. Warner, 538 U.S. 314 (2003), is the seminal starting point to determine whether the award of $108,000 in attorneys' fees is a dischargeable debt or whether such an award is not dischargeable under the "fraud exception" of 11 U.S.C. § 523(a)(2)(A). The Fifth Circuit Court of Appeals chose a different starting point and, not surprisingly, it traveled down the wrong road to a misdirected and harmful end.

In *Archer*, this Court analyzed, under 11 U.S.C. § 523(a)(2)(A), the nature and origin of a breach of a *contractual* settlement of a prior *fraud* claim. *Archer*, 538 U.S. at 316-20. The debtors argued that the origin of the claim by the creditors was a breach of contract that replaced or novated any prior fraud claim, *because the settlement included a full release of, and a judgment dismissing, any fraud claim. Id.* The creditors argued that the origin of the current claim was the original fraud claim. *Id.*

This Court agreed with the creditors. *Id.* at 323. Of particular importance for this appeal, this Court held that there should be the ". . . fullest possible inquiry . . ." ". . . into the true nature of the debt. . . .". *Id.* at 319-21. It even held that concepts of "issue-preclusion" or "claims-preclusion" will not limit this ". . . fullest possible inquiry." *Id. Archer* made clear that the determination of whether a debt is dischargeable or not requires a different determination than the liability and damage determinations made by a jury or lower court. *Id.* As such, the "full inquiry" test is *sui generis* and requires more than a cursory review of the form of action, verdict or judgment. *Id.*

Archer relied upon *Cohen v. de la Cruz*, 523 U.S. 213 (1998) in reaching its holdings. *Archer*, 538 U.S. at 321. Like *Archer*, *Cohen* articulated a tracing analysis that determined whether a debt was dischargeable or not based upon the origin of the "enforceability" of the debt. *Cohen*, 523 U.S. at 218-22. *Cohen* further confirmed that this "tracing after a full inquiry test" went to the heart of national bankruptcy law, as bankruptcy allows debtors to reorder their financial affairs and get a fresh start accomplished through the statutory discharge of preexisting debts. *Id.* at 217.

Stare decisis extends the precedential effect of Archer to all lower federal and state courts, especially as it relates to the required uniformity of tests in the construction of federal statutes, such as the Bankruptcy Code. *IBP, Inc. v. Alvarez*, __ U.S. __, 126 S. Ct. 514, 523, __ L. Ed. 2d __ (2005). The Second Circuit Court of Appeals has even considered the logic of the *Archer* test so important that it applied that logic and test to another exception under 11 U.S.C. § 523. *In Re DeTrano*, 326 F.3d 319, 322-23 (2d Cir. 2003).

The resulting "fullest" inquiry also applied to the Fifth Circuit Court of Appeals. *Alvarez*, 126 S. Ct. at 523; *Archer*, 538 U.S. at 316-23. This inquiry required the Fifth Circuit Court of Appeals to analyze the nature of a fraud claim and the nature of a breach of contract claim, and then determine which one of these claims is the genesis of the award of attorneys' fees. *Id.* If the breach of contract claim is the genesis, then the award of attorneys' fees is dischargeable. *Id.* If the fraud claim is the genesis, then the award of attorneys' fees is not dischargeable. *Id.* Or, stated differently, the Fifth Circuit Court of Appeals had to determine whether the award of attorneys' fees requires a breach of contract

award (which is dischargeable) or whether the award of attorneys' fees can exist if there is just a fraud award. *Id.*

The Fifth Circuit Court of Appeals adopted a different test. It relied upon *Gober v. Terra Corp.*, 100 F.3d 1195 (5th Cir. 1996). *Gober* is a pre *Archer* case. The Fifth Circuit Court of Appeals had to follow *Archer*, but it did not follow *Archer* or even cite to *Archer* except in an elliptical passing in an earlier part of the opinion.

As a result of following *Gober* rather than *Archer*, the Fifth Circuit held that the "full inquiry" into whether fraud claims under Texas law permits a recovery of attorneys' fees is "irrelevant." The Fifth Circuit Court of Appeals offered no explanation, nor could it offer any explanation, why it did not have to follow the *Archer* "full inquiry" test.

The Fifth Circuit then further turned *Archer* on its head. It suggested that the only relevant inquiry is whether a prevailing party who sues for breach of contract (which will support a recovery of attorneys' fees) and who sues for fraud (which will not support a recovery of attorneys' fees) has to segregate the attorneys' fees incurred by claim. This inquiry is not the relevant inquiry under *Archer*. This inquiry, moreover, recognizes that the recovery of attorneys' fees under Texas law depends solely on whether there is a breach of contract claim, as there is no possible award under a fraud claim by itself. Yet, the Fifth Circuit Court of Appeals refused to trace the award of attorneys' fees to that breach of contract source and thereby find such an award fully dischargeable.

Snook provided the Fifth Circuit Court of Appeals with a road map under *Archer's* fullest inquiry test. Unfortunately, the *Archer* fullest inquiry test is the road less traveled in the Fifth Circuit Court of Appeals.

Under Texas law, attorneys' fees are not recoverable unless provided by statute or contract. *Dallas Central Appraisal District v. Seven Investment Company*, 835 S.W.2d 75, 76-77 (Tex. 1992). A claim for an oral or written contract is the sole origin of the right to recover attorneys' fees under the express unambiguous text of Tex. Civ. Prac. and Rem. Code Sections 38.001 *et seq. Angroson, Inc. v. Independent Communications, Inc.*, 711 S.W.2d 268, 274 (Tex. App. - Dallas 1986, writ ref'd. n.r.e.).

The origin of Popiel's claim for fraud is very different. The jury found that Snook defrauded Popiel under definitions of fraud contained in *International Life Insurance Company v. Herbert*, 334 S.W.2d 525, 530 (Tex. Civ. App. - Waco 1960, writ ref'd n.r.e.) (fraud is the successful employment of cunning, deception or artifice to circumvent or defraud another) and contained in *Stone v. Lawyers Title Insurance Corporation*, 554 S.W.2d 183, 185 (Tex. 1977) (misrepresentational fraud) (Pet. App. 5). The Texas Supreme Court has held that the origin of such fraud claims is the misstatements or actions separate from a breach of contract, and that are separately actionable in and of themselves, *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 13 (Tex. 1996). It concretized this holding by holding further that the origin of a fraud claim is a breach of a duty not to mislead that arises independently of a contract or a breach of a contract. *Formosa Plastics Corporation, USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1997). In *Formosa Plastics*, the Texas Supreme Court clarified that any fraud arises from the breach of an independent duty even when the fraudulent misrepresentations are subsumed by the terms of a contract or the damages from the misrepresentations are economic damages that are solely the subject of a contract. *Id.* at 46-47.

Under the foregoing analysis, the origin of the award of attorneys' fees, as a matter of law, is the award of breach of contract or *quantum meruit* damages. The award of attorneys' fees is equally fully dischargeable as are the admitted fully dischargeable breach of contract and *quantum meruit* damages.

The Fifth Circuit Court of Appeals, unlike the lower courts, did not discuss *Gill Savings*, which is a Texas Fourteenth Court of Appeals intermediate appellate decision that the Texas Supreme Court affirmed and modified in a *per curiam* decision without oral argument. *Gill Savings Association v. Chair King, Inc.*, 783 S.W.2d 674 (Tex. App. – Houston [14th Dist.] 1989) *aff'd in part and mod. in part per curiam without oral argument*, 797 S.W.2d 31 (Tex. 1990). Any discussion of this case, however, would not change the result in this case.

In *Gill Savings*, a lessee received, among other damages, damages for breach of contract and for fraud. *Gill Savings*, 783 S.W.2d at 680. The lessee also received an award of attorneys' fees. *Id.* The opinion is generally silent on whether the successful lessee has to elect between the breach of contract and fraud damage recoveries. *Id.* The unsuccessful party asserted that attorneys' fees are not recoverable in fraud cases. *Id.* The Fourteenth Court of Appeals answered, "[a]lthough the case is in tort, an award of attorneys' fees is permissible since *there was a claim for and a finding of breach of contract*, and the tort complained of *arose out of that breach*." *Id.* [Emphasis added]. The Fourteenth Court of Appeals determined that the origin of the award of attorneys' fees was the breach of contract, and upheld the award of attorneys' fees because the fraud arose out of the

breach of contract. The Fourteenth Court of Appeals continued,

> [h]owever, where as here, the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable, the party suing for attorney's fees may recover *even though under one or more of the causes of action such fees are not recoverable.*

Id. [Emphasis added]. The Fourteenth Court of Appeals simply held that the successful lessee could recover all of the alleged attorneys' fees, even though some of those fees embraced the fraud claim (for which no recovery of attorneys' fees was possible), because the successful lessee secured a favorable breach of contract verdict. The breach of contract damages remained at all times the basis for the holdings by the Fourteenth Court of Appeals. The Texas Supreme Court reviewed the holdings of the Fourteenth Court of Appeals without any oral argument and through a short *per curiam* decision. *Gill Savings*, 797 S.W.2d 31. It modified the holding of the Fourteenth Court of Appeals on an unrelated issue of whether the successful lessee had to proffer evidence on the amount of appellate attorneys' fees. *Id.* at 32. On the main relevant issue, the Texas Supreme Court observed, "[the successful lessee] was awarded attorney's fees based upon a finding of fraud *arising out of a breach of contract.* Attorney's fees are statutorily authorized *for breach of contract actions.*" *Id.* at 31. [Emphasis added]. The Texas Supreme Court cited no authority except for a reference to Tex. Civ. Prac. and Rem. Code Sections 38.001-38.005. This brief *per curiam* opinion confirmed that the origin of attorneys' fees, when there is a breach of contract damage

award and a fraud damage award, is still the breach of contract damage award.

The Fourteenth Court of Appeals shortly thereafter revisited the holding in *Gill Savings. Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 103 (Tex. App. – Houston [14th Dist.] 1994, writ den'd). In *Serv-Tech*, the Fourteenth Court of Appeals held:

> Rather, appellee argues that 'in this case the breach of contract as well as the tort occurred simultaneously and in concert and together produced the damages.' Under such circumstances, appellee argues that this court's decision in [*Gill Savings*] 'is in point.' We disagree. In *Gill*, the trial was before the court which awarded actual and punitive damages and attorneys' fees in a suit 'for fraud, breach of contract and numerous other torts.' The trial court assessed a sum certain as attorney's fees which this court and the supreme court held were proper *based upon a breach of contract.* Here a sum certain for attorney's fees based upon breach of contract was not awarded – rather the jury was asked to find, and they did find, a percentage of the total recovery 'as a reasonable fee for the necessary services' of the attorneys. This was improper because it permitted appellee to recover attorney's fees on claims for which attorney's fees are not recoverable. See, *Stewart Title Guaranty Company v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). . . .

Serv-Tech, 879 S.W.2d at 103 (emphasis added). In *Serv-Tech*, the Fourteenth Court of Appeals confirmed (1) that the breach of contract damages was the genesis of the

recovery of attorneys' fees in *Gill Savings*, (2) that an award of fraud or tort damages by themselves will not support an award of attorneys' fees, and (3) that the "inseparable claims" doctrine in *Gill Savings* and *Stewart Title* does not change the prior two holdings. *Id. Serv-Tech* further confirmed that any application of *Gill Savings* to hold that attorneys' fees may be awarded under a tort and not a breach of contract in an "inseparable claims" situation is wrong.

The "breach of contract" origin of an award of attorneys' fees derives from the authority relied upon by the Fourteenth Court of Appeals in *Gill Savings*. In *Gill Savings*, the Fourteenth Court of Appeals uncritically cited to the intermediate appellate opinion in *Wilson v. Ferguson*, 747 S.W.2d 499, 504 (Tex. App.-Tyler 1988, writ den'd.). *Id. Wilson*, however, simply repeats the conclusion that a successful fraud plaintiff can recover attorneys' fees for fraud when the fraud arises out of a breach of contract. *Wilson*, 747 S.W.2d at 504. *Wilson*, in turn, cited to *Rocha v. Merritt*, 734 S.W.2d 147, 148 (Tex. App. - Houston [1st Dist.] 1987, no writ). *Id. Rocha* further repeats the conclusion that because a successful plaintiff can sue in breach of contract or independently in tort, then the tort arises out of the breach of contract. *Id.*

Under an *Archer-Cohen* tracing analysis, *Gill Savings*, if applied as written, supports Snook's position that the traceable genesis of Popiel's recovery of attorneys' fees has to be the fully dischargeable awards of breach of contract or *quantum meruit* damages. This Court must not lose sight of the focus of this case. This is a case to determine whether Popiel's award of attorneys' fees is or is not dischargeable based upon an *Archer-Cohen* tracing analysis. The tracing analysis is key and not whether Texas law would or would

not allow for the recovery of attorneys' fees in a non-bankruptcy context. Snook still contends that *Gill Savings* cannot survive *Ace Sign* and *Formosa Plastics*. Nevertheless, *Gill Savings* concretizes the breach of contract origin of any award of attorneys' fees.

CONCLUSION

Petitioner Orin S. Snook requests that, for the reasons stated in this petition, the petition be granted and, thereafter, that this Court reverse the decision of the lower courts and confirm that the award of attorneys' fees is fully dischargeable.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED FEBRUARY 22, 2006

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20583
Summary Calender

In the Matter of
ORIN SNOOK, ANGELA SNOOK,

Debtors.

ORIN SNOOK,

Appellant,

v.

JAN V. POPIEL, INCORPORATED,

Appellee.

Decided Feb. 22, 2006

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Appendix A

In this bankruptcy action, debtor Orin Snook appeals the findings of the bankruptcy court and the district court that a particular debt was not dischargeable in bankruptcy. We affirm.

I. FACTS AND PROCEEDINGS

Snook and Jan V. Popiel, Inc. ("Popiel") entered into a construction contract in which Popiel agreed to work on Snook's residence. Complications ensued and the two parties sought relief in Texas state courts. At the conclusion of the trial, the jury found in favor of Popiel and awarded damages as follows: $1731 for fraud; $8631.50 for breach of contract; and $4852.37 for *quantum meruit*. The jury charge set out a separate question for each type of damage alleged and an additional question on attorney fees, without apportionment by claim. None of the individual damages inquiries included an award for attorney fees. In response to the separate attorney fees question, the jury determined that "the reasonable fee for the necessary services of Popiel, Inc.'s attorneys" amounted to $108,000.[1] Snook did not appeal the judgment.

Subsequently, Orin and Angela Snook filed for bankruptcy protection under chapter 7. Popiel initiated an adversary proceeding as a creditor to except portions of Snook's debt from discharge under 11 U.S.C. § 523. The bankruptcy court determined that the $1731 award for fraud and the $108,000 award for attorney fees were both non-

1. The court also awarded post-judgment interest of ten percent on all monetary awards.

dischargeable debts.[2] On the limited question of whether the attorney fees were dischargeable, Snook appealed the bankruptcy court's order to the district court. The district court dismissed the appeal with prejudice; Snook now appeals to this court. On appeal, Snook advances the same argument that both the bankruptcy court and the district court rejected.

II. STANDARD OF REVIEW

This court reviews the district court's dismissal of an appeal from the bankruptcy court under the same standards the district court applies to the bankruptcy court. *I.G. Petroleum, L.L.C., v. Fenasci (In re West Delta Oil Co.)*, 432 F.3d 347, 354 (5th Cir.2005). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Id.* (citing *Daniels v. Barron (In re Barron)*, 325 F.3d 690, 692 (5th Cir.2003)).

III. DISCUSSION

A chapter 7 bankruptcy proceeding "does not discharge an individual debtor from any debt . . . for money, property, services . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). The Supreme Court has read this provision as exempting from discharge all debts arising out of the underlying fraud. *Cohen v. de la Cruz*, 523 U.S. 213, 218, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) ("Once it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge."). *See also Archer v.*

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2. The bankruptcy court determined that the awards for breach of contract and *quantum meruit* were dischargeable.

Warner, 538 U.S. 314, 321, 123 S.Ct. 1462, 155 L.Ed.2d 454 (2003) ("The dischargeability provision applies to all debts that 'aris[e] out of' fraud.") (quoting *Brown v. Felsen*, 442 U.S. 127, 138, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979)). This circuit has articulated the reach of § 523: "[T]he status of ancillary obligations such as attorney's fees and interest depends on that of the primary debt. When the primary debt is nondischargeable ..., the attorney's fees and interest accompanying compensatory damages, including post-judgment interest, are likewise nondischargeable." *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1208 (5th Cir.1996). Under this regimen, if the attorney fees arose from Snook's fraud, then that debt, like the fraud debt, is not dischargeable.

Snook concedes that his debt from the state court's award of fraud damages is not dischargeable; nevertheless, he asks the court to discharge the award of attorney fees attendant to the state court judgment. Snook contends (1) that the jury award specifically excluded attorney fees from the fraud award, and (2) that, under Texas law, attorney fees are not recoverable for fraud claims. As a result, Snook's theory continues, the attorney fees are not traceable to the fraud-based debt, and, therefore, not exempted from discharge under 11 U.S.C. § 523. We disagree and hold they are exempt from discharge.

Snook's argument has two aspects. The first aspect of Snook's argument is that the attorney fees were not traceable to the fraud award because of Popiel's statements and the form of the jury charge. In Snook's view, Popiel admitted the attorney fees were not traceable when Popiel argued to the bankruptcy court that "[t]he attorney's fees that Popiel

seeks to recover were awarded as attorney's fees, separate and distinct from the fraud damages." In context, it is clear that Popiel was simply describing the form of the jury charge and the manner in which the different awards were presented. The statement, viewed in context, is no admission that the award of attorney fees was limited to the breach of contract and *quantum meruit* claims. Indeed, Popiel was arguing quite the opposite in the brief Snook quotes.

With respect to the jury charge, none of the damages inquiries included attorney fees in the calculation, and, as such, the fact that the fraud damages question asked for the jury's damages assessment "excluding reasonable attorneys fees, if any" is of no import.[3] What is important, and not discussed by Snook is that the jury charge question on attorney fees lacked any limitation. Rather, the jury was simply asked, "What is the reasonable fee for the necessary services of Popiel, Inc.'s attorneys in this case, in dollars and cents?" Reading the jury charge as a whole, it is clear

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3. The damages calculation for breach of contract was limited to

> the difference between the amount to be paid under the contract and the amount Popiel was actually paid. For the *quantum meruit* award, the calculation was limited to the reasonable value of the work performed, but not otherwise paid. Unlike the fraud damages question, which asked for damages proximately caused by the fraud, attorney fees were beyond the scope of these questions. Accordingly, while neither inquiry expressly excludes attorney fees, such an exclusion was unnecessary because neither admit to the inclusion of attorney fees.

that the jury itemized the damages awards by claim and, separately, reached an award of attorney fees for the case as a whole.

The second aspect of Snook's argument is that the attorney fees could not be traceable to the fraud finding because, as a matter of Texas law, attorney fees are not recoverable for fraud actions in the absence of punitive damages. Whether Texas allows attorney fees for pure fraud claims, a question we do not reach here, is irrelevant for these purposes. In Texas, where two or more claims are advanced and only some of the claims entitle a litigant to attorney fees, Texas courts have awarded fees for all claims that are too intertwined to differentiate effectively those that allow fees and those that do not:

When one or more causes of action for which attorney fees are not permitted by statute or contract are alleged in a petition and are investigated and pursued at trial, it is incumbent upon the party asserting those causes of action to segregate them from those for which attorney fees can be recovered. A recognized exception to this duty to segregate arises when the attorney fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their "prosecution or defense entails proof or denial of essentially the same facts." When the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are "intertwined to the point of being inseparable," the party suing for attorney fees may recover the entire amount covering all claims.

Sauceda v. Kerlin, 164 S.W.3d 892, 923 (Tex.App.2005) (involving claims of breach of contract, breach of fiduciary duty, fraud, and conspiracy to commit fraud and breach of fiduciary duty) (internal citations omitted) (quoting *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex.1991)). Many Texas cases support this proposition. *See, e.g., Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 143 (Tex.App.2005) (holding that, where the claims are intertwined "the party suing for attorney's fees may recover the entire amount covering all claims"); *Willis v. Donnelly*, 118 S.W.3d 10, 46 (Tex.App.2003) ("In other words, segregation of attorney's fees is not required where the services rendered relate to (1) multiple claims arising out of the same facts or transaction and (2) the prosecution or defense entails proof or denial of essentially the same facts, so as to render the attorney's fees inseparable."); *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 417 (Tex.App.2003) (noting that where claims are intertwined "the entire amount covering all claims may be awarded.").

The form of the jury charge makes it clear that, in keeping with the above referenced cases, the attorney fees were not segregated by claim before the trial court. Rather, the attorney fees award was properly for the prosecution of all of Popiel's claims. Of those claims, each resulted in an award for Popiel and, subsequently, a debt for Snook. Snook's debt for the fraud award is exempt from discharge. Snook's debt for the attorney fees award, as discussed above, arises out of the fraud-based debt. Accordingly, Snook's debt for the attorney fees award is also exempt from discharge.

Appendix A

IV. CONCLUSION

Finding no error, we AFFIRM.

APPENDIX B — MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JUNE 20, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-04-651

ORIN SNOOK,

Appellant,

V.

JAN V. POPIEL, INC.,

Appellee.

Bankruptcy No. 02-41844
Adversary Proceeding No. 03-3392

MEMORANDUM AND OPINION

Appellant, Orin Snook, has moved this court to reconsider its decision affirming a bankruptcy court finding of nondischargeability. (Docket Entry No. 9, 11). Appellee, Jan V. Popiel, Inc., opposes reconsideration. (Docket Entry No. 12). Based on the motion and responses, the parties' submissions, and the applicable law, this court denies Snook's motion for reconsideration, for the reasons set out below.

Appendix B

I. Background

This court's memorandum and opinion of September 10, 2004 contains the history of this dispute in a detail that is not required here. Briefly, Snook filed for bankruptcy after receiving an adverse judgment in his state court lawsuit against appellee, Jan V. Popiel, Inc. The jury had assessed damages on Popiel's counterclaims against Snook asserting breach of contract, *quantum meruit*, and fraud. (Docket Entry No. 9, at 2-4). The jury assessed $1,731.00 in damages for fraud, "excluding reasonable attorney's fees, if any." The jury also found that Popiel's breach-of-contract damages totaled $8,631.50. (*Id.* at 4). The jury concluded that Popiel had performed compensable work that remained unpaid and awarded $4,852.37 under the *quantum meruit* claim. Finally, the jury found that Popiel's attorney incurred a reasonable fee of $108,000. (*Id.*). The trial court entered final judgment, specifying each element of damages, pre- and post-judgment interest, and attorneys' fees. Snook then filed for bankruptcy. (*Id.* at 5). The bankruptcy court held that Snook's Chapter 7 bankruptcy discharged Snook's liability for the breach-of-contract and *quantum meruit* damages, but did not discharge the fraud damages or the attorneys' fees. The bankruptcy court refused to discharge the attorneys' fee award on the ground that it flowed from and related to a nondischargeable debt, the fraud judgment. The parties appealed only the order that the attorneys' fee award was nondischargeable. This court affirmed.

II. Analysis

"A motion to reconsider an order . . . is appropriate when the court is presented with newly-discovered evidence, when the court committed clear error, when there is an intervening change in controlling law, or when other highly unusual circumstances exist." *Becerra v. Asher*, 921 F. Supp. 1538, 1548 (S.D. Tex. 1996), *aff'd*, 105 F.3d 1042 (5th Cir.). A close review of Snook's lean motion for reconsideration reveals no new evidence, clear error, or an intervening change in the controlling law. Snook concedes that he reiterates the arguments previously presented in his original brief and then repeated in his reply. (Docket Entry No. 11, at 1-4). Snook again argues that the attorneys' fee award could not have flowed from or related to the fraud judgment because under Texas law, attorneys' fees are not recoverable for fraud unless punitive damages accompany the fraud judgment. Contrary to Snook's argument, Texas courts have awarded attorneys' fees on a finding of fraud arising out of an alleged breach of contract. *See, e.g., Adams v. H&H Meat Prods., Inc.*, 41 S.W.3d 762, 780 (Tex. App.—Corpus Christi 2001, no writ). Snook points to the Supreme Court decision in *Cohen v. De La Cruz*, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998) for the proposition that "the *legal basis* of the 'debt of a fraud claim' defines dischargeability." (emphasis Snook's). *Cohen* does not contain the quoted language, although it does explain why punitive damages stemming from fraud, like other damages that arise from fraud, are neither dischargeable in bankruptcy nor limited to the value of the money or property fraudulently obtained by the bankruptcy debtor. *See id.* at 222, 118 S. Ct. at 1218-19.

Snook also cites the Texas Supreme Court's decision in *Formosa Plastics Corp. U.S.A. v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1997), for the proposition that "the *legal basis* of a fraud claim is a breach of an independent duty and not an action on a contract even though the fraud and the fraud damages may relate to a contract." (Docket Entry No. 11, at 3). As Popiel argues, the court in *Formosa Plastics* did discuss the distinction between fraud and contract claims, but held that fraud damages can arise from a breach of a contractual relationship. 960 S.W.2d at 54. While *Formosa Plastics* did not address the dischargeability of attorneys' fees arising from a successful fraud claim the Texas Supreme Court held that tort damages can be awarded for fraudulent inducement to contract. *Id.* at 47.

This court fully considered Snook's arguments in the Memorandum and Opinion, finding that Texas law did not support his position.[1] Because Snook has not provided different authorities or arguments, his motion to reconsider is denied.

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1. Counsellor Snook asserts that this court "ignores" and "does not recognize [his] argument, let alone even try to address [his] argument in its complete manifestation." (*Id.* at 3). Snook then faults this court's prior opinion for "incomplete[ly]" summarizing Snook's argument and for not citing two particular cases. Although this court appreciates counsel's desire "to provide the Court with an opportunity to consider the entire briefing," (*id.* at 1), this court has already recognized, and availed itself of, that opportunity.

Appendix B

III. Conclusion

Snook's motion for reconsideration is denied.

SIGNED on June 20, 2005, at Houston, Texas.

s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX C — MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED SEPTEMBER 9, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-651

ORIN SNOOK,

Appellant,

V.

JAN V. POPIEL, INC.,

Appellee.

Bankruptcy No. 02-41844
Adversary Proceeding No. 03-3392

MEMORANDUM AND OPINION

This is an appeal from the bankruptcy court's determination of nondischargeability. A Texas state court found Orin Snook liable to pay Jan V. Popiel, Inc. damages for breach of contract, fraud, and *quantum meruit*. The state court judgment also awarded Popiel attorney's fees. The judgment debtor, Snook, filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. Popiel filed an adversary complaint objecting to the dischargeability of the

fraud damages and the attorney's fees award. The parties filed cross-motions for summary judgment in the adversary action.

The parties agreed that the fraud damages were not dischargeable and that the breach of contract and *quantum meruit* damages were dischargeable, but disputed the dischargeability of the attorney's fee award. The bankruptcy court granted Popiel's motion for summary judgment and denied Snook's motion, finding that the attorney's fee award was nondischargeable. This appeal followed.

Based on the pleadings, the motions and responses, the record, and the applicable law, this court affirms the order of the bankruptcy court. The reasons are set out below.

I. Background

Snook sued Jan V. Popiel, Inc., d/b/a Popiel Homes, Inc., d/b/a Ice Block of South Texas, Inc., in state district court in Fort Bend County, Texas. The claims arose from a March 11, 1996 construction contract between Snook and Popiel relating to a single-family residence. Snook alleged breach of contract and fraud. Popiel counterclaimed, asserting breach of contract, fraudulent inducement to contract, statutory fraud, and *quantum meruit.* Both sides sought attorney's fees.

The jury returned a verdict in favor of Popiel. The jury found that Popiel had not committed fraud and that Popiel's failure to perform the contract was excused. The jury found that Snook had committed fraud against Popiel. The jury answered "yes" to the following question:

Appendix C

8. Did Snook commit fraud against Popiel, Inc.?

Fraud may occur when one person engages in a successful employment of actions, words or conduct designed to cheat or deceive another person.

Fraud also may occur when —

a. a party makes a material misrepresentation,

b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that it should be acted upon by the other party, and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

or when —

a. a party conceals or fails to disclose a material fact within the knowledge of that party.

b. the party knows that the other person is ignorant of the fact and does not have an equal opportunity to discover the truth.

c. the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and

d. the other party suffers an injury as a result of acting without knowledge of the undisclosed fact.

Answer Yes or No: *Yes*

In answer to the next question, the jury found that the fraud damages, the difference between the "represented sums to be paid for the work done prior to July 26, 1996, under the agreement between Snook and Popiel, Inc. and the actual sums received by Popiel, Inc. under the agreement; and any costs, charges or expenses incurred by Popiel, Inc. as a foreseeable consequence of being defrauded, excluding Popiel, Inc.'s reasonable attorney's fees, if any," were $1,731.00.

The jury also found that Snook had breached his contract with Popiel and that the damages, the "difference between the amount provided for by the agreement, if any, for work done prior to July 26, 1996 and the amount actually paid to Popiel, Inc. by Snook," amounted to $8,631.50. The jury also found that Popiel had performed compensable work not covered by the agreement that remained unpaid. The jury assessed the reasonable value of such work at $4,852.37. Finally, the jury found that the reasonable fee for the necessary services of Popiel's attorney was $108,000.

Appendix C

The trial court entered final judgment, as follows:

(a) Damages arising from fraud in the amount of One Thousand Seven Hundred Thirty-One and No/100 Dollars ($1,731.00), together with accrued pre-judgment interest at the rate of ten percent (10%) per annum from January 27, 1997 through January 9, 2003, in the amount of One Thousand Twenty-Eight and 59/100 Dollars ($1,028.59), plus interest at the rate of $.47 per diem through the date of judgment, and post-judgment interest at the rate of ten percent (10%) per annum from the date of judgment until all sums are paid;

(b) Damages arising from breach of contract in the amount of Eight Thousand Six Hundred Thirty-One and 50/100 Dollars ($8,631.50), together with accrued pre-judgment interest at the rate of eighteen percent (18%) per annum from August 1, 1996 through January 9, 2003, in the amount of Ten Thousand Twelve and 14/100 Dollars ($10,012.14), plus interest at the rate of $4.26 per diem through the date of judgment, and post-judgment interest at the rate of ten percent (10%) per annum from the date of judgment until all sums are paid;

(c) Damages arising from a claim in quantum meruit in the amount of Four Thousand Eight Hundred Fifty-Two and 37/100 Dollars ($4,852.37), together with accrued pre-judgment interest at the rate of six percent (6%) per annum from January 27, 1997 through January 9, 2003, in the amount of One Thousand Seven Hundred Thirty Three and 30/100 Dollars ($1,733.30), plus interest at the rate of $.80 per diem through the date of judgment, and post-judgment interest at the rate of ten percent (10%) per annum from the date of judgment until all sums are paid.

IT IS FURTHER ORDERED that Defendant Jan V. Popiel, Inc. have and recover judgment from and against Plaintiff Orin Snook for attorneys fees in the amount of One Hundred Eight Thousand and No/100 Dollars ($108,000.00), plus additional attorneys fees in the amount of Twelve Thousand and No/100 Dollars ($12,000.00) in the event of an appeal of this case to the Court of Appeals, and additional attorneys fees in the amount of Ten Thousand and No/100 Dollars ($10,000.00) in the event of an appeal of this case to the Texas Supreme court, together with post judgment interest on said amounts from the date of this judgment until all sums are paid.

Appendix C

The bankruptcy court held as a matter of law that Snook's discharge in bankruptcy would release him from the breach of contract and *quantum meruit* damages awarded in the state court judgment, but would not release him from the fraud damages or the attorney's fees award. The only subject of this appeal is the order that the attorney's fee award is nondischargeable.

II. Analysis

In reviewing a bankruptcy court decision, a district court functions as an appellate court and applies the standards of review generally applied in federal courts of appeal. *In re Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992). Legal conclusions are subject to de novo review. *In re Herby's Foods, Inc.*, 2 F.3d 128, 130 (5th Cir. 1993).

Section 523 of the Bankruptcy Code provides exceptions to the general rule that all debts are dischargeable in bankruptcy. The nondischargeability provision at issue is in section 523(a):

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by —
> >
> > > (A) false pretenses, a false representation, or actual fraud, . . .

11 U.S.C. § 523(a).

Appendix C

The Supreme Court has explicitly stated that collateral estoppel, or issue preclusion, principles apply in bankruptcy dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n.11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). In such proceedings, "[p]arties may invoke collateral estoppel in certain circumstances to bar relitigation of issues relevant to dischargeability, although the bankruptcy court retains jurisdiction to ultimately determine the dischargeability of the debt" *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1201 (5th Cir. 1996). The preclusive effect given to state court judgments under collateral estoppel is a function of the fall faith and credit statute. *See Matter of Schwager*, 121 F.3d 177, 181 (5th Cir. 1997); *Garner v. Lehrer (In re Garner)*, 56 F.3d 677, 679 (5th Cir.1995) (citing 28 U.S.C. § 1738 ("[J]udicial proceedings of any court of any [State] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.")). A bankruptcy court's decision to give preclusive effect to a state court judgment is a question of law that this court reviews *de novo*. *Gober*, 100 F.3d at 1201; *Garner*, 56 F.3d at 679.

Because the 2003 judgment was entered by a Texas state court, Texas rules of preclusion apply. *See Garner*, 56 F.3d at 679 & n.2. "Under Texas law, collateral estoppel 'bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.'" *Id.* at 679 (quoting *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex.1984)); *accord Gober*, 100 F.3d at 1201. The elements of collateral estoppel under Texas

law are: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.*, *663* S.W.2d 816, 818 (Tex.1984).

The parties do not challenge the bankruptcy court's conclusion that collateral estoppel applied, based on the jury's findings in the 2003 judgment. The jury found several facts that pertain to this case. In response to Question No. 8, the jury found that Snook committed fraud against Popiel The instructions defined fraud as a "material misrepresentation made with knowledge that it is false or made recklessly without knowledge of the truth and as a positive assertion, with the intent that it should be acted on by the other party, on which the other party acted in reliance and suffered injury." The instructions also defined fraud as a "concealment or failure to disclose a material fact, with knowledge that the other person is ignorant of the fact and does not have an equal opportunity to discovery the truth, with the intent to induce the other party to take action by concealing or failing to disclose the fact, and action by the other party without knowledge of the undisclosed fact or concealment of a material fact, resulting in injury." The jury then awarded damages in response to Question No. 9, which asked the jury to determine any damages for the fraud they had found, excluding attorney's fees.

The bankruptcy court determined that jury's finding of fraudulent inducement and award of damages for that fraudulent conduct barred relitigation of these issues under

the doctrine of collateral estoppel and satisfied the elements of nondischargeability under section 523(a)(2)(A). That determination is not challenged. The bankruptcy court also found that the attorney's fee award was nondischargeable because it flowed from and related to a nondischargeable debt, the fraud judgment. Snook asserts that the bankruptcy court's conclusion is erroneous, because under Texas law, attorney's fees are not recoverable for fraud unless punitive damages are awarded.

Whether an ancillary obligation, such as attorney's fees, is dischargeable in bankruptcy depends on whether the primary debt is dischargeable. *Gober*, 100 F.3d at 1208; *Stokes v. Ferris (In re Stokes)*, 150 B.R. 388, 393 (W.D.Tex.1992) (holding all debts awarded by a Texas court, including punitive damages, legal fees, and post-judgment interest, to be nondischargeable), *aff'd* 995 F.2d 76 (5th Cir.1993); *Klingman v. Levinson*, 831 F.2d 1292,1296-97 (7th Cir.1987) (holding attorney's fees nondischargeable); *Jennen v. Hunter (In re Hunter)*, 771 F.2d 1126, 1131 (8th Cir.1985) (holding that attorney's fees and interest attach to primary debt and are nondischargeable); *Stanley v. Cole (In re Cole)*, 136 B.R. 453, 459 (Bankr.N.D.Tex.1992) (holding exemplary damages, costs and interest nondischargeable); *In re Christian*, 111 B.R. 118, 122-23 (Bankr.W.D.Tex.1989) (holding attorney's fees nondischargeable); *cf. Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-28 (5th Cir.1991) (holding that where party has contracted to pay attorney's fees and interest for collection of nondischargeable debt, fees and interest also will not be discharged in bankruptcy), *overruled on other grounds*, *Colton v. Bank of Malvern (In re Coston)*, 991 F.2d 257 (5th

Cir.1993). An attorney's fee award is nondischargeable when it flows from a nondischargeable debt. *See In re O'Neill*, 260 B.R. 122, 129-30 (Bankr.E.D.Tex. 2001); *In re Stokes*, 150 B.R. at 393; In *re Gober*, 100 F.3d at 1208; *In re Christian*, 111 B.R. at 122.

Snook's argument is that under Texas law, the primary debt for the attorney's fees award had to be the jury's finding that Snook breached his contractual obligation to Popiel and could not be the jury's finding that Snook committed fraud. Snook relies on Texas cases stating that in general, attorney's fees cannot be awarded for fraud unless punitive damages are awarded. *Star Houston , Inc. v. Shevack*, 886 S.W.2d 414, 422 n.9 (Tex.App.—Houston 1994), *writ den'd per curiam*, 907 S.W.2d 452 (Tex 1995); *Kilgore Fed. Savings and Loan Assoc. v Donnely*, 624 S.W.2d 993, 938 (Tex. Civ. App— Tyler 1981, writ ref'd n.r.e.); *Hennigan v. Harris County*, 593 S.W.2d 380 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

Under Texas law, attorney's fees must be based on statutory or contractual authority. Chapter 38 of the Texas Civil Practice and Remedies Code authorizes fees in breach of contract actions when three requirements are satisfied: (1) the party prevails and recovers damages in its breach of contract action; (2) the party presents evidence of a reasonable fee for the services rendered in connection with the prevailing claim; and (3) the party satisfies the procedural requirements of section 38.002 regarding "presentment." *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 603, 613 (5th Cir. 2000) (citations omitted). The Texas Supreme Court has recently held that section 38.001

permits the recovery of attorney's fees for fraud *claims* when the fraud arises out of a breach of contract action. *See Gill Sav. Ass'n. v. Chair King, Inc.*, 797 S.W.2d 31, 31 (Tex 1990). Other Texas appellate courts have extended this exception to any "tort" that arises out of a breach of contract. *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 288 (Tex. App.—Corpus Christi 1992, writ granted), *aff'd as modified, Schindler v. Austwell Farmers Coop.*, 841 S.W.2d 853 (Tex. 1992) (citing *Gill Say. Ass'n*, 797 S.W.2d at 31); *Wilson v. Ferguson*, 747 S.W.2d 499, 504 (Tex. App.—Tyler 1988, writ denied)). Indeed, one court has approved an attorney's fee award for a party that did not actually prevail on the breach of contract claim. *See Adams v. H&H Meat Prods., Inc.*, 41 S.W.3d 762, 780 (Tex. App.—Corpus Christi 2001, no pet).

In *DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 430-31 (5th Cir. 2003), the Fifth Circuit Court of Appeals made an *Erie* guess as to whether, under Texas law, attorney's fees were recoverable under an equitable exception for tortious interference with an existing contract. *Id.* The Fifth Circuit relied heavily on a Beaumont Court of Appeals opinion in holding that attorney's fees were recoverable: "We hold that *Texas Beef Cattle is* the appropriate Texas precedent to apply in this diversity case . . . [and that the] exception is limited to situations 'where the natural and proximate results and consequences of prior wrongful acts had been to involve a plaintiff . . . in litigation with and against third parties and other parties.'" *Id.* (quoting *Tex. Beef Cattle Co. v. Green*, 883 S.W.2d 415, 430 (Tex App.—Beaumont 1994), *rev'd on other grounds*, 921 S.W.2d 203 (Tex. 1996). In *Coffel v. Stryker Corp.*, 284 F.3d 625, 641 (5th Cir. 2002), the Fifth Circuit noted that Texas law permits an award of attorney's

fees for a fraud claim interrelated to a successful contract claim, requiring the district court to reconsider the requirement to segregate attorney's fees between the successful contract claims and the successful fraud claims and to award only the fees allocated to the contract claims.

Snook's argument that under Texas law, the award of attorney's fees could not have related to the fraud claim, but only to the breach of contract and *quantum meruit* claims, is inconsistent with the most recent Texas cases. Snook's alternative argument is that the record does not establish whether the fraud recovery in this case arose from the breach of contract, so as to allow this court to find that under Texas law, the attorney's fee award was based on section 38.001 and was ancillary to a nondischargeable primary debt. Popiel's counterclaim makes it clear that the claim of fraud was a claim of fraudulent inducement for Popiel to enter into the contract with Snook. (Pl.'s Mot. Summ. J., Ex. C, p.5). In answer to Question 10, the jury found that Snook breached this contract. Popiel also points out that the jury verdict itself shows that the fraud damages arose from the contract between the parties. The jury was asked in Question No. 9 to determine the amount of damages if they had found that Snook had defrauded Popiel. In that question, the court instructed the jury to consider the "difference between the represented sums to be paid for the work done prior to July 26, 1996 under the agreement between Snook and Popiel, Inc., and the actual sums received by Popiel, Inc. under the agreement. . . ." The jury was asked in Question No. 12 to determine the amount of damages if they had found that Snook had failed to comply with the terms of his contract with Popiel, Inc. In that question, the court instructed the jury to consider the

"difference between the amount provided for by the agreement, if any, for work done prior to July 26, 1996 and the amount actually paid to Popiel, Inc. by Snook." The record sufficiently shows that Popiel recovered damages from Snook for fraud arising from a breach of the contract between Snook and Popiel

III. Conclusion

This court affirms the bankruptcy court's order that the state court judgment awarding damages for fraud and awarding attorney's fees is nondischargeable. This appeal is dismissed.

SIGNED on September 9, 2004, at Houston, Texas.

s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JANUARY 22, 2004

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 02-41844-H1-7

CHAPTER 7

ADVERSARY NO. 03-3392

IN RE:

ORIN SNOOK and ANGELA SNOOK,

Debtors

JAN V. POPIEL, INC.

Plaintiff

vs.

ORIN SNOOK,

Defendant

MEMORANDUM OPINION

I. Background Facts and Procedural History

Debtors, Orin and Angela Snook, filed a voluntary chapter 7 petition. Plaintiff, Jan V. Popiel, Inc., a creditor,

filed this adversary proceeding to except from debtors' discharge in bankruptcy a debt pursuant to 11 U.S.C. §523 and Bankruptcy Rules 4007 and 7001(6).

The debt at issue is a final state court judgment rendered against Debtor Orin Snook by the 240th Judicial District Court of Fort Bend County, Texas, in a case styled Orin Snook v. Juan Rico Batch, Individually, Jan Popiel, Individually, Foam Block, Inc. and Jan V. Popiel, Inc. The final judgment was based on a jury verdict that found for Jan V. Popiel, Inc. and against debtor Orin Snook. The judgment includes an award of damages based on fraud to Jan V. Popiel, Inc. of $1,731.00 with pre-judgment interest of $1,028.59. It also provides a recovery of $108,000.00 in attorney's fees for Jan V. Popiel. These particular parts of the judgment and whether they are non-dischargeable are at issue in this adversary proceeding.

Plaintiff Jan V. Papiel, Inc. filed a Motion for Summary Judgment in this adversary proceeding. Defendant debtor Snook filed a Reply and Cross-Motion for Summary Judgment and Plaintiff responded. The Court held an oral argument hearing on the Motion and Cross-Motion for Summary Judgment. After careful consideration of the pleadings and the arguments presented by counsel for Plaintiff and Defendant, the Court ruled that $1731.00 of the judgment awarded for damages arising from fraud to be non-dischargeable and granted Plaintiff's Summary Judgment as to that part. The Court took the Motion and Cross-Motion for Summary Judgment as to the attorney's fees awarded in the state court judgment under advisement. After further consideration of the pleadings and arguments presented by

counsel, this Court rules that the attorney fees of $108,000 awarded in the state court jury verdict are non-dischargeable. The state court entered Final Judgment against Orin Snook on January 9, 2003.

II. Analysis

Plaintiff Popiel and Defendant Snook set forth various arguments in their pleadings and during oral arguments, but only the issue pertaining to the dischargeability of all or part of the attorney's fees award from the state court judgment remains for decision.

A. The final judgment awarding attorney's fees does not have to apportion the fees among the claims where all of the claims are dependent upon the same set of facts and circumstances.

Plaintiff Popiel contends that the entire amount of the attorney's fees awarded in the state court judgment is non-dischargeable in Defendant Snook's bankruptcy because the entire award of attorney's fees is traceable to a fraud judgment. On the other hand, Defendant Snook argues that the entire amount of attorney's fees is dischargeable through bankruptcy because these were awarded pursuant to the breach of contract and quantum meruit awards in the final judgment, and not pursuant to the non-dischargeable fraud damages award. The attorney's fees award was not apportioned in the state court judgment among the various claims and this presents a unique question for the court as to whether it must now allocate the attorney's fees attributable to the non-dischargeable fraud claim.

There is a threshold, issue, then, of whether the state court had a duty to segregate the attorney's fees among the claims and whether a failure to segregate gives rise to a need to remand the matter to state court for a segregation of the fees. This Court concludes that it lacks jurisdiction to review the state court ruling concerning any duty under Texas law to segregate the fees among the claims. However, upon reviewing the facts of the case, it appears to this Court and does conclude that the breach of contract, quantum meruit, and fraud claims tried in state court were all dependent on the same set of facts and circumstances.

B. Attorney's Fees are recoverable for a fraud claim where that claim is based on a breach of contract.

Although there was no segregation of fees in the state court judgment, Defendant debtor Snook argues that the state court final-judgment awarded attorney's fees based solely on the contract breach and quantum meruit claims, are both dischargeable in bankruptcy. Debtor Snook insists that creditor Plaintiff Popiel, Inc. is trying to recover the entire amount of attorney's fees as part of the fraud damages award and that attorney's fees are not recoverable as actual damages under a fraud claim. *Dodaon v. Church (In re Church)*, 69 B.R. 425 (Bankr. N.D. Tex. 1987); *Advanced Business Systems, Inc. v. Philips Information Systems Co.*, 750 F.Supp. 774 (E.D. La. 1990); *Star Houston, Inc. v. Shevack*, 886 S.W.2d 414 (Tex. App.—Houston (1st Dist.) 1994). Since attorney's fees cannot be awarded as part of the fraud damages, according to Defendant, then the fees awarded in the state court judgment must be pursuant only to the

dischargeable contract breach and quantum meruit claims. Therefore, debtor Defendant Snook contends, the attorney's fees are also dischargeable. However, both state and federal courts have ruled that Texas law provides for the recovery of attorney's fees for fraud claims in contract/fraud cases where there is a finding of breach of contract, and the tort complained of arose out of that breach. *Gill Savings Association v. Chair King, Inc.*, 783 S.W.2d 674, 680 (Tex. App.—Houston (24th Dist.) 1989), *modified*, 797 S.W.2d 31 (Tex. 1990)(citing *Wilson v.* Ferguson, 747 S.W.2d 499, 504 (Tex. App.—Tyler, 1988, writ denied); *Coffel v. Stryker Corporation*, 284 F.3d 625, 641 (5th Cir. 2002). Because the fraud damages judgment that Plaintiff Popiel obtained against Defendant Snook arose out of a breach of contract claim, attorney's fees can be recovered for the fraud claim.

B. Attorney's fees associated with a suit establishing fraud are considered to flow from the fraud and are non-dischargeable pursuant to 11 U.S.C. 1523(a)(2)(A).

Attorney's fees that floe from and relate to a primary claim that is a non-dischargeable debt are likewise non-dischargeable. *Gober Y. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1208 (5th Cir. 1996); *Viking Dynamics, Ltd. v. O'Neill (In re O'Neill)*, 260 B.R. 122, 129-30 (Bankr. E.D. Tax. 2001); *Texas Venture Partners v. Christian (In re Christian)*, 111 B.R. 118, 122 (Bankr. W.D. Tex. 1989). The primary claim at issue hers is a state court fraud judgment that in non-dischargeable pursuant to 11 U.S.C. §523(a)(2)(A). The state court judgment also awarded Plaintiff Popiel attorney's fees in a lump sum to compensate the attorneys for all of their work related to the suit. The United States

Supreme Court has stated that attorney's fees associated with a suit establishing fraud are considered to flow from the fraud and are likewise non-dischargeable pursuant to 11 U.S.C. §523(a)(2)(A). *Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998).

C. CONCLUSION

Plaintiff Popial's state court award for fraud has already been declared a non-dischargeable debt by this Court pursuant to 11 U.S.C. §523(a)(2)(A). Based on the foregoing consideration of the pleadings and analysis of case law, this Court now concludes that the full amount of attorney's fees also awarded in that state court judgment, $108,000, were incurred in the suit establishing fraud and are likewise non-dischargeable under 11 U.S.C. §523(a)(2)(A).

The Motion for Summary Judgment of Plaintiff Jan V. Popiel, Inc. regarding attorney's fees is GRANTED. The debt based on the state court judgment award to Plaintiff Popiel, Inc. of $1,731.00 plug $1,028.59 interest for fraud damages and $108,000 as attorney's fees is nondischargeable by their bankruptcy.

Ordered in chambers in Houston, Texas on January 22, 2004.

s/ Manuel D. Leal
MANUEL D. LEAL
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E — FINAL JUDGMENT OF THE DISTRICT COURT OF FORT BEND COUNTY, TEXAS, 240TH JUDICIAL DISTRICT JANUARY 10, 2003

IN THE DISTRICT COURT OF
FORT BEND COUNTY, TEXAS
240TH JUDICIAL DISTRICT

NO. 107,719

ORIN SNOOK

VS.

JUAN RICO BATCH ET AL.

FINAL JUDGMENT

BE IT REMEMBERED that on the 10th day of September 2002, came on to be heard the above-captioned matter. Plaintiff Orin Snook appeared personally and through his attorney of record. Defendants Jan V. Popiel and Jan V. Popiel, Inc. d/b/a Popiel Homes, Inc., Juan Rico Batch and Foam Block, Inc., each appeared by and through their respective attorneys of record.

A jury of twelve (12) good and lawful jurors was duly impaneled and sworn, and the case proceeded to trial. After all the parties rested, the case was submitted to the jury with a charge consisting of instructions, definitions, and fifteen (15) questions. All questions of fact were submitted to the jury. After due deliberation, the jury returned and announced its verdict in open court, which verdict was duly received

and filed by this Court. The verdict of the jury was 11-1 in favor of Defendants Jan V. Popiel, Jan V. Popiel, Inc., Juan Rico Batch and Foam Block, Inc.

The charge of the Court and the verdict of the jury are attached to this Final Judgment and are incorporated herein for all purposes. Defendant Jan V. Popiel, Inc., having moved for judgment based on the jury's verdict, and this Court having considered Defendant's Motion for Judgment and all other pertinent pleadings and the agreement of counsel as to the form of the Final Judgment, finds that the verdict of the jury was for Defendants and against Plaintiff Orin Snook, and that judgment should be rendered upon this verdict accordingly.

IT IS THEREFORE ORDERED that Plaintiff Orin Snook take nothing by reason of his claims against Defendants Jan V. Popiel, individually, Jan V. Popiel, Inc. d/b/a Popiel Homes, Inc., Juan Rico Batch and Foam Block, Inc. and that all costs of court are taxed against the Plaintiff

IT IS FURTHER ORDERED that Defendant Jan V. Popiel, Inc. have and recover judgment from and against Plaintiff Orin Snook, as follows:

(a) Damages arising from fraud in the amount of One Thousand Seven Hundred Thirty-One and No/100 Dollars ($1,731.00), together with accrued pre-judgment interest at the rate of ten percent (10%) per annum from January 27, 1997 through January 9, 2003, in the amount of One Thousand Twenty Eight and 59/100 Dollars ($1,028.59), plus interest

at the rate of $.47 per diem through the date of judgment, and post-judgment interest at the rate of ten percent (10%) per annum from the date of judgment until all sums are paid;

(b) Damages arising from breach of contract in the amount of Eight Thousand Six Hundred Thirty-One and 50/100 Dollars ($8,631.50), together with accrued pre-judgment interest at the rate of eighteen percent (18%) per annuam from August 1, 1996 through January 9, 2003, in the amount of Ten Thousand Twelve and 14/100 Dollars ($10,012.14), plus interest at the rate of $4.26 per diem through the date of judgment, and post-judgment interest at the rate of ten percent (10%) per annuam from the date of judgment until all sums are paid;

(c) Damages arising from a claim in quantum meruit in the amount of Four Thousand Eight Hundred Fifty-Two and 37/100 Dollars ($4,852.37), together with accrued pre-judgment interest at the rate of six percent (6%) per annum from January 27,1997 through January 9, 2003, in the amount of One Thousand Seven Hundred Thirty-Three and 30/100 Dollars ($1,733.30), plus interest at the rate of $.80 per diem through the date of judgment, and post-judgment interest at the rate of ten percent (10%) per annum from the date of judgment until all sums are paid.

Appendix E

IT IS FURTHER ORDERED that Defendant Jan V. Popiel, Inc. have and recover judgment from and against Plaintiff Orin Snook for attorneys fees in the amount of One-Hundred Eight Thousand and No/100 Dollars ($108,000.00) plus additional attorneys fees in the amount of Twelve Thousand and No/100 Dollars ($12,000.00) in the event of an appeal of this case to the Court of Appeals, and additional attorneys fees in the amount of Ten Thousand and No/100 Dollars ($10,000.00) in the event of an appeal of this case to the Texas Supreme Court, together with post-judgment interest on said amounts from the date of this judgment until all sums are paid.

All costs of courts are taxed against Plaintiff Orin Snook.

All writs and processes for the enforcement and collection of this judgment may issue as necessary.

All relief requested in this case and not expressly granted herein is denied.

SIGNED this 10th day of Jan., 2003.

s/ [illegible]
JUDGE PRESIDING

APPENDIX F — RELEVANT STATUTE

11 U.S.C. § 523

SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required—

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

Appendix F

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

* * * *